Wilmington Fabricators, Inc., Debtor-in-Possession and Teamsters Local 829, a/w International Brotherhood of Teamsters and Rodney Valladares

Wilmington Fabricators, Inc., Debtor-in-Possession and Rodney Valladares and Teamsters Local 829, a/w International Brotherhood of Teamsters. Cases 1–CA–30434, 1–CA–31010, 1–CA–32169, and 1–CA–32170

September 15, 2000

# DECISION AND ORDER

# BY CHAIRMAN TRUESDALE AND MEMBERS FOX AND LIEBMAN

On March 7, 1997, Administrative Law Judge Richard H. Beddow Jr. issued the attached decision. The Respondent and the General Counsel filed exceptions and supporting briefs, and the Respondent filed a brief in response to the General Counsel's exceptions.<sup>1</sup>

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, <sup>2</sup> and conclusions and to adopt the recommended Order as modified.<sup>3</sup>

1. The Respondent excepts to the judge's finding that it violated Section 8(a)(3) and (1) of the Act when it discharged employee Danilo Guzman in August 1993. The Respondent contends that the General Counsel failed to prove that it knew that Guzman supported the Union or that it was motivated by union animus when it dis-

<sup>1</sup> The General Counsel filed a motion to strike the Respondent's answering brief, styled as "Respondent's Reply Brief To Union's Exceptions and Brief to the Decision of the Administrative Law Judge," because it did not comply with the requirements of Sec. 102.46(d)(1) and (2) of the Board's Rules and Regulations. Those sections require that an answering brief be limited to issues raised in the opposing party's exceptions. In this case, the Union did not file any exceptions and those filed by the General Counsel pertain only to apparently inadvertent technical omissions in the judge's notice to employees. The Respondent's answering brief, by contrast, addresses the substantive issues of timeliness, waiver, failure to recall employees from layoff, and failure to bargain. Thus, in view of the fact that the Respondent's answering brief is not limited to issues raised in any opposing party's exceptions, we shall grant the General Counsel's motion.

<sup>2</sup> The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

charged Guzman. We find no merit in the Respondent's exception.

It is apparent from the record that, as the judge found, the Respondent's Hispanic employees were the driving force behind the Union's organizing effort in the spring of 1992.<sup>4</sup> The Union initially was contacted by Hispanic employees, two preelection meetings were held at the homes of Hispanic employees and attended only by Hispanic employees, and the Union won the election by the precise number of Hispanic employees as are in the Respondent's work force. Moreover, soon after the election, the Union's business agent, Arthur Lazazzaro, met with Hispanic employees on two occasions, once in the Respondent's facility with a few employees, and then with a larger group of Hispanic employees in the Respondent's parking lot after he was refused entry to the facility. On each occasion, Lazazzaro's interaction with the Hispanic employees was observed by Supervisor Wally French. Similarly, on June 30, 1992, employees elected an Hispanic employee, Felipe Collazo, to be their union steward.

The Respondent contends that these facts do not evidence its knowledge that its Hispanic employees as a group supported the Union. We disagree. Although each of these facts, in isolation, may not independently demonstrate that the Respondent knew its Hispanic employees were union supporters, taken together they support the judge's finding. Further, if the Respondent had any doubt as to the union sentiments of its Hispanic employees before the election, that doubt was dispelled by events which occurred after the election. Soon after the election, Hispanic employees complained to their supervisors that they were being denied overtime because of their support of the Union. Moreover, these allegations were repeated in charges filed by Collazo and the Union with the Board, which were resolved pursuant to a settlement in February 1993 of pending Board complaints on these allegations. In October 1993, six Hispanic employees filed a charge alleging that the Respondent laid off Hispanic employees in September 1993 because of their support for the Union.<sup>5</sup> Given that the Respon-

<sup>&</sup>lt;sup>3</sup> We find merit in the General Counsel's exceptions regarding the proposed notice to employees and shall correct the judge's omissions in the notice and amend his recommended Order to include the corrected notice.

<sup>&</sup>lt;sup>4</sup> The Union filed a petition to represent the production and maintenance employees at the Respondent's Wilmington, Massachusetts facility, at which it manufactures metal office furniture and partitions, on April 10, 1992. Following a Stipulated Election Agreement, an election was conducted June 11, 1992. The Union won the election by a vote of 17 to 11, out of a total of 28 eligible voters.

<sup>&</sup>lt;sup>5</sup> The Regional Director issued a complaint in Case 1–CA–31010 alleging that the layoff and refusal to recall Aquiles Cabrera and the refusal to recall Estervina Sanchez violated Sec. 8(a)(3) and (1). The Respondent settled the complaint as to Cabrera, and he returned to work on January 10, 1994. The Respondent's failure to recall Sanchez is the subject of this proceeding.

dent's Hispanic employees began complaining shortly after the election about the Respondent's treatment of them in connection with their support for the Union, it is clear that the judge was correct in finding that, as of the date of the unfair labor practices at issue here, the Respondent knew that its Hispanic work force was closely aligned with the Union.

We also agree with the judge that the Respondent knew or believed that Guzman was a union supporter and that his discharge was motivated by the Respondent's union animus. Guzman was injured in an automobile accident on June 21, 1994, while riding in the same vehicle with Union Steward Collazo and Aquiles Cabrera, who was the subject of an unfair labor practice complaint issued January 6, 1994. Collazo and Cabrera, who had also been injured in the accident, were permitted to return to work on July 25. Guzman attempted to return to work 1 week later, and was informed that he had been discharged for violating an unpublished rule about absenteeism.

The Respondent displayed its union animus during the organizing campaign when its president, Paul Winchell, told employees that he would oppose the Union with all his strength; that a union was the worst thing that could happen to a company; and that employees would be without work and lose their jobs.<sup>6</sup> This animus, the Respondent's knowledge that its Hispanic employees supported the Union, Guzman's close association with known union supporters, and the judge's findings concerning the circumstances surrounding the Respondent's claim that Guzman had violated an absenteeism rule support a finding that the Respondent's refusal to permit Guzman to return to work after the automobile accident was motivated at least in part by the Respondent's union animus and its desire to eliminate yet another Hispanic employee from its work force. See Armstrong Rubber Co., 283 NLRB 625, 635–637 (1987) (discharge unlawful if motivated by employer's belief that discriminatee was union supporter). See also *PJAX*, 307 NLRB 1201, 1204 (1992).

We are not persuaded by the Respondent's argument that the fact that it permitted Collazo and Cabrera to return to work following the automobile accident demonstrates that union animus was not a factor in its decision not to allow Guzman to return. On the contrary,

Winchell admitted that, as to Collazo, who was the Union's steward, it had earlier feared "trouble" from him and for that reason did not lay him off in September 1993, when other employees were laid off from work. It is likely that the Respondent feared similar trouble if it did not permit Collazo, who remained at that time the union steward, to return to work after the accident. Similarly, Cabrera already had been the subject of an unfair labor practice complaint, which the Respondent settled earlier that year by returning him to work from layoff. Thus, of the three, Guzman was the only Hispanic employee who had not demonstrated that he would pose a risk of legal trouble for the Respondent if discharged.

Accordingly, we agree with the judge that the General Counsel has proved that the Respondent was motivated by union animus when it discharged Danilo Guzman in August 1994; and, as explained in the judge's decision, the Respondent has not demonstrated that it would have discharged Guzman even absent his union activity. Wright Line, 251 NLRB 1083 (1980), enfd. on other grounds 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1992), approved in NLRB v. Transportation Management Corp., 462 U.S. 393 (1983).

2. We also reject the Respondent's contention that the allegations concerning the Respondent's failure to recall laid off employees, made as an amendment to the charges in Cases 1-CA-32169 and 1-CA-32170, are time-barred under Section 10(b) because the amendment was made in April 1996. The original charge in Case 1-CA-32169, filed October 3, 1994, alleged that the Respondent violated Section 8(a)(3) and (1) when it discharged Guzman. The original charge in Case 1-CA-32170, filed the same date, alleged that the Respondent violated Section 8(a)(5), (3), and (1) by subcontracting unit work. Under established "relation back" rules, a later filed charge will be not be deemed barred under Section 10(b) if it is "closely related" to a timely filed charge. Redd-I, Inc., 290 NLRB 1115 (1988). Accord: Nickles Bakery of Indiana, 296 NLRB 927 (1989). The Respondent contends that the amendments are not closely related to the allegations in the original charges. We disagree.

The gravamen of the original charge in Case 1–CA–32170 is that the Respondent was engaging in subcontracting without bargaining with the Union and with the unlawful motive of diverting work from its Hispanic employees in retaliation for their support for the Union.<sup>7</sup>

<sup>&</sup>lt;sup>6</sup> Winchell's remarks occurred more than 6 months prior to the filing of the first unfair labor practice charge and were not alleged in the complaint as an unfair labor practice. Nevertheless, this background evidence, which the Respondent does not factually dispute, may be used to establish the Respondent's union animus. See *Oklahoma Fixture Co.*, 314 NLRB 958, 959 fn. 3 (1994), enf. denied on other grounds 79 F.3d 1030 (10th Cir. 1996).

<sup>&</sup>lt;sup>7</sup> The charge reads:

On a date presently unknown within the past six months, the Employer has subcontracted bargaining unit work without notifying Teamsters Local 829, the certified bargaining agent; without bargain-

The April 1996 amendment, likewise, alleges that the Respondent failed to recall laid-off Hispanic employees for the purpose of diminishing their number in the bargaining unit because they supported the Union.<sup>8</sup> Both the original charge and the amendment are based on the legal theory that the Respondent is diverting work from employees who had supported the Union, which in each instance directly affected the availability of work for laid-off employees.9 Moreover, the original charge and the amendment involve similar factual circumstances and sequence of events-that the Respondent employed a number of Hispanic employees in its work force; that those employees sought representation and supported the Union in the election; and that in retaliation for their support for the Union, the Respondent laid off and refused to recall Hispanic employees, and hired non-Hispanic employees in their place. Finally, both the charge and the amendments involve similar defenses that the Respondent was motivated by legitimate reasons, and not union animus, in making job assignments and employment decisions. Applying the test of Redd-I, supra, we find, therefore, that the amendments to Case 1-CA-32170 are closely related to the original charge and are therefore timely.<sup>10</sup>

# **ORDER**

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Wilmington Fabricators, Inc., Wilmington, Massachusetts, its officers, agents, successors, and assigns, shall take the action set forth in the Order, except that the attached notice is substituted for that of the administrative law judge.

## **APPENDIX**

# NOTICE TO EMPLOYEES POSTED BY ORDER OF THE

ing with that Union concerning either the decision or its effects; and in retaliation for the Union activity of its employees.

- The amended charge in Case I-CA-32170 reads, in pertinent part: In or about September 1994, and continuing, the above named employer, unilaterally and without bargaining with the union, refused to recall unit employees and, at the same time, hired new employees. In or about September 1994, and continuing, the above named employer refused to recall laid off employees because [sic] those employees had engaged in union activities.
- <sup>9</sup> In particular, we note that the evidence in this proceeding shows that the unit work which had been subcontracted to the wife of one of the Respondent's supervisors, and which was performed at her home, was work of the type previously performed by employee Estervina Sanchez, who was at the time on layoff status. See also fn. 11, below.
- <sup>10</sup> The April 1996 amendments also closely track the allegations in Case 1–CA–31010, filed October 1993, which alleged that the Respondent's failure to recall Estervina Sanchez from layoff, while at the same time subcontracting her work to the wife of a supervisor, violated Sec. 8(a)(3) and (1). See *NLRB v. Fant Milling Co.*, 360 U.S. 301 (1959).

# NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection To choose not to engage in any of these protected concerted activities.

WE WILL NOT discriminatorily terminate employees because they engage in union or other protected concerted activities.

WE WILL NOT fail and refuse to recall laid-off employees because they engage in union or other protected concerted activities.

WE WILL NOT fail and refuse to bargain collectively regarding wages, hours, and other terms and conditions of employment with Teamsters Local 829, a/w International Brotherhood of Teamsters, the Union, as the exclusive representative of our employees in the appropriate unit set forth below concerning the recall of laid off unit employees. The appropriate unit is:

All full time and regular part time warehousemen, shippers, receivers, machine operators, welders and painters, but excluding all office clerical employees, guards, and supervisors as defined in the Act.

WE WILL NOT discriminatorily fail to notify the Union of any changed plans concerning the recall of laid-off unit employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Danilo Guzman full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL, within 14 days from the date of the Board's Order, recall from layoff Estervina Sanchez and all other employees laid off in September 1993 who were also discriminatorily denied recall, without prejudice to their seniority or any other rights or privileges they previously enjoyed.

WE WILL make Danilo Guzman, Estervina Sanchez, and all other employees who were discriminatorily de-

nied recall whole for the loss of earnings and other benefits resulting from the discrimination against them, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Danilo Guzman, and WE WILL, within 3 days thereafter, notify him in writing that this has been done ant that the discharge will not be used against him in any way.

WE WILL bargain in good faith with the Union as the exclusive collective-bargaining representative of all employees in the appropriate unit set forth above with respect to the terms and conditions of recalling laid-off unit employees.

## WILMINGTON FABRICATORS, INC.

Thomas J. Morrison, Esq., for the General Counsel. Philip G. Boyle and Nereyda F. Garcia, Esqs., of Boston, Massachusetts, for the Respondent.

#### DECISION

# STATEMENT OF THE CASE

RICHARD H. BEDDOW, Administrative Law Judge. This matter was heard at Boston, Massachusetts, on October 3, 1994, and September 30, and October 1 and 2, 1996. The proceeding is based upon an initial charge filed July 30, 1993, by International Brotherhood of Teamsters Local Union No. 829, AFL-CIO (the Union or Local 829) against Wilmington Fabricators, Inc. of Wilmington, Massachusetts. The Regional Director's consolidated complaint dated April 30, 1996, alleges that Respondent violated Section 8(a)(1), (3), and (5) of the National Labor Relations Act (the Act) by threatening to deny employees overtime, by denying Felipe Collazo the opportunity to work overtime, by failing and refusing to recall Estervina Sanchez from layoff, by discharging Danilo A. Guzman from employment, and by failing to notify the Union of its intentions and failing and refusing to recall laid-off employees, because of their union or other protected concerted activities.

Upon a review of the entire record in this case and from my observation of the witnesses and their demeanor, I make the following

## FINDINGS OF FACT

# I. JURISDICTION

Respondent is engaged in the manufacture, distribution, and sale of fabricated metal work stations and related metal furniture and fixtures. It annually ships goods valued in excess of \$50,000 from its Wilmington location to points outside Massachusetts and it annually purchases and receives goods and materials valued in excess of \$50,000 directly from points outside Massachusetts. It admits that at all times material, is and has been an employer engaged in operations affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act. It also admits that the Union is a labor organization within the meaning of Section 2(5) of the Act.

## II. THE ALLEGED UNFAIR LABOR PRACTICES

The Respondent has been owned by Paul Winchell and his family since 1969. It has experienced periods of success and growth but also suffered major setbacks. The Company has changed course, reduced or redirected its operations, as needed, and survived a bankruptcy from which it was discharged in November 1993.

On two separate occasions before 1990, it laid off a significant portion of its workforce. The first layoff was in 1985, and approximately one-half of its 70 employees were laid off when it began to fabricate another product line that required employees with different skill sets. In 1989, 4 out of the remaining 25 to 30 employees were laid off and not recalled after a crucial machine brokedown.

In the spring of 1990, the Bank of New England called a note and froze all the funds in a company account that was not designated a payroll account and Winchell met the payroll from his personal funds, which effectively wiped out his savings and, as he believed he could not meet future payrolls, the Company laid off 12 out of approximately 25 employees, only 3 of whom were later recalled.

In early 1992, Louis Coiro was the supervisor of fabrication and Wally French was the supervisor of final assembly. Respondent employed about 30 employees, of whom 19 were Hispanic employees. At that same time employees Danilo Guzman and Rodney Valladares began to speak about the need for a union among themselves and with other employees, including Sergio Almonte and Teofilio Vidale Morales. In March, Valladares called the Union and spoke with Dan McLaughlin, the secretary-treasurer, and as a result of this call, Arthur Lazazzero, a union business agent since January 1992, met with some of the Wilmington employees. The meeting took place in late March or early April 1992 at the Valladares home and approximately 15 hispanic employees attended.

The second meeting took place prior to April 10 at the home of Sergio Almonte and was attended by about 17 employees, again all of them were Hispanic. Employees signed union authorization cards or took blank union authorization cards back to Respondent's facility. Thereafter, the Union filed a representation petition on April 10, 1992, and the parties signed a Stipulated Election Agreement on April 24, 1992. After the petition was filed, and before the election, Respondent engaged in a vigorous antiunion campaign which included antiunion literature and meetings with employees in which Winchell said, among other things, that he would oppose the Teamsters with all the strength that he had, that a union was the worst thing that could happen to a company, and that employees would be without work and lose their jobs.

An election was held on June 11. Of about 28 eligible voters, 17 votes were for the Union and 11 votes against. On June 22, 1992, the Union was certified as the representative of Wilmington employees.

After the election, and continuing through September 1992, Respondent hired several new, non-Hispanic employees including Chris Sullivan and James Pitman on June 15, Henry Bagrowski on July 9, Mike DiRocco on July 15, Eugene Smith on July 22, Robert Silva and Alex Caporizzo on August 25, and Laura Michalski on September 8.

After the election, Union Agent Lazazzero visited Respondent's facility with a notice to post about a union meeting and spoke with Supervisor French. French accompanied him to the timeclock area where Lazazzero spoke with about five employees, all of whom were Hispanic. Later, when Lazazzero returned Respondent's facility, he was met by French and told that he could not come onto the property. French said that Winchell had been upset over the fact that he had been allowed into the plant earlier. Lazazzero then met with about 15 Hispanic employees off the property but in the immediate area of the facility, while French watched. On June 30, Felipe Collazo was made union steward and he thereafter distributed union dues and membership cards at Respondent's facility. He spoke with French about giving the documents out and was told that he could do it during breaks.

Employee Almonte testified that immediately after the election, he questioned Supervisor Coiro about why the Respondent had taken away his right to work overtime and that Coiro told him that Winchell had said that Almonte, Collazo, and others would not work anymore overtime because they had brought the Union in. Aquiles Cabrera also testified that he approached Coiro and asked about working overtime and Coiro said that those that had voted for the Union would not get overtime. Collazo testified that between June 30, 1992, when he was made steward, and July 16, 1992, when he was out of work because of an on the job injury, he asked Coiro about overtime and was told that nobody was working overtime. He also said that as steward, he attended one negotiating session in July 1993 where one of the issues raised concerned the pay rate of Estervina Sanchez. After the election. Sanchez had told Union Agent Lazazzero that she thought she was being treated unfairly. Sanchez had been employed by Respondent since January 1987, as an electrical assembler and was paid \$6.75 per hour. Paul LeMay had been employed since March 1992 in same classification but was paid \$8.50 per hour. When Lazazzero brought the subject up at negotiation the Company explained that although Sanchez and LeMay did the same work, LeMay handled heavier products.

In February 1993, the Respondent settled a number of complaints before the Board. The complaint were based on unfair labor practice charges filed by, among others, the Union and Collazo and involved, in part, an allegation concerning the assignment of overtime and the settlement included a backpay remedy of approximately \$35,000.

In March 1993, Almonte again approached Supervisor Coiro and asked him why he no longer worked overtime and Coiro told him that they could not work overtime because of Winchell's instructions. Morales and Collazo confirmed that Almonte immediately told them what Coiro had said. After Coiro's statement, Collazo did not receive any overtime, although some other employees did. Specifically, between January and September 1993, Pat Ferullo (who had a welding job classification) worked about 190 hours of overtime. Collazo had returned from a work-related injury in December 1992 and was on light duty through February 1993, when he was able to return to his regular duties. At the time, Collazo was primarily a welder; however, he assertedly was capable of performing most, if not all, of the job functions at Respondent's facility.

In June and August 1993, the Respondent failed to get major contracts that it had expected and as a result, it decided to lay off employees. It determined that it would keep those employees who had been cross trained and had multiple skills and it planned to retain both Collazo and Ferullo, having them split the welding functions even though there was not enough welding work for two. Ferullo immediately quit, however, leaving Collazo to work full time.

By letter dated September 13, 1993, the Respondent informed the Union that it was laying off employees effective September 15. The letter indicated that the layoff would extend through the week and that about 20 employees could expect a 3-day layoff during the next 3 weeks. It specifically identified five employees that would not be laid off, it including Collazo. Winchell testified that Collazo was not laid off because Respondent did not want any trouble from him. The letter, which was delivered to Lazazzero, also stated that the bargaining unit employees would be recalled. Lazazzero testified that he did not call the Employer because he understood that the layoff would be temporary. Although Winchell said he anticipated that the layoff was going to be short term, many employees were not recalled and the Respondent did not notify the Union that the layoff would be extended indefinitely. Among those laid off were new employees Larry Copans, Laura Michelski, and Dick Kenneally, however, within a matter of weeks, they were recalled. Otherwise, the Union did not respond to the layoff notification and it never requested to bargain about the matter.

Alexander Caporizzo and Estervina Sanchez, both light assemblers, were laid off. Caporizzo was a part-time employee who had less seniority than Sanchez (he was not an employee at the time of the election in June 1992) and Sanchez had trained Caporizzo. In October 1993, Caporizzo was recalled. Winchell stated that Caporizzo was recalled to do light housing assembly because there was only enough work for a part timer and that Sanchez was not recalled because she could not work in the light assembly area because of the weight and bulk of the products being manufactured. He also said that Sanchez would have cost the Employer more because of health insurance. During the investigation of the charge in Case 1–CA–31010. Winchell gave a sworn affidavit in which he stated that Supervisor William Dorris was building light assembly work at home. In his testimony, however, Winchell said that William Dorris was not performing light assembly work at home but was taking them home where his wife performed the work. Winchell also said that even considering this work, there would not have been enough work for Sanchez. Theresa Dorris continued performing light assembly work, the type work primarily done by Sanchez, through at least April 1996.

Guzman was employed by the Employer from about June 6, 1988, until his discharge on about August 1, 1994. He was capable of doing most of the jobs in the Employer's facility, had developed multiple skills, and was not laid off in September 1993 because of these factors. He also worked extensive overtime. On June 21, 1994, employees Guzman, Cabrera, and Collazo were in an automobile accident. After the accident, all of them went to Lawrence General Hospital. While Collazo and Cabrera worked the next day, Guzman did not. Guzman

went to the hospital, had various tests done, and saw a chiropractor. The next day, however, both Collazo and Cabrera left work because they did not feel well. On June 23, Guzman and his daughter went to the Employer's facility and Guzman's daughter gave a note from the chiropractor to the Employer. The note stated that Guzman was being treated for an injury and could not return to work. With some small variation, Collazo and Cabrera did the same thing. Each of them received a note from the Company, dated June 23, which stated that before they could return to work they needed a note from their physician stating that they could do their job. By letter dated June 28, the Company contacted Guzman's chiropractor, stating that Guzman would need a note before he could return to work. Neither the June 23 note to Guzman nor the June 28 letter from the Employer to the chiropractor said anything about contacting the Company periodically to report his status but Guzman saw his chiropractor weekly and, weekly sent information about his physical status to the Employer. Guzman also told Cabrera that he was sending these reports to the Respondent.

On July 25, Cabrera and Collazo returned to work. On August 1, 1 week later, Guzman, received medical clearance to return to work and attempted to return. He testified that he gave his clearance note to Supervisor Coiro, but Coiro told him that there was no work for him and, according to Guzman, "brushed him off." Guzman attempted to involve Collazo and have him intervene with Coiro, but Coiro ignored these attempts.

Cabrera had been recalled on January 10, 1994. Thereafter, Respondent did not recall any of the other employees who had been laid off in September 1993, however, hiring of new employees began when it hired Sean Riddell in September 1994, Ian Batchelder in October 1994, and Michael May and Mark Celata in November 1994, as regular full-time employees. None of these four individuals had been employed by Respondent prior to their hire in late 1994 and the Respondent did not notify the Union of its actions.

# III. DISCUSSION

These proceedings arose after a contested election was conducted and the Union won certification as the exclusive collective-bargaining representative of a unit of Respondent's employees on June 22, 1992. A review of the circumstances at the time of the election in June clearly establishes Respondent's knowledge of employee union activity and antiunion animus. At the time of the election, there were 30 employees in the unit, of whom 19 were Hispanic and 11 were non-Hispanic. Prior to the election, the Union held a number of organizing meetings that were attended by only Hispanic employees and the Respondent was aware of the union activity prior the second organizing meeting being held and well before the representation petition was filed. Respondent immediately began a campaign designed to frustrate and defeat the Union. After the election, the union representative met with Hispanic employees at Respondent's facility and was observed by Respondent. The number of votes cast against the Union in the election was identical to the number of non-Hispanic employees employed at the time of the election, the hires made after the election were non-Hispanic, and under these circumstances, I agree with the General Counsel's contention that these facts support the inference that Respondent concluded that the employees that supported the Union were Hispanic.

The Respondent and the Union engaged in limited bargaining negotiations but did not succeed in reaching any agreement. Otherwise, the Respondent's antiunion animosity did generate conduct which resulted in a number of changes of alleged unfair labor practices that substantially were resolved by a settlement agreement, however, several other complaint allegations survived and are the subject of this proceeding. These issues concern threats and denial of overtime opportunities, failure to recall one employee from layoff the discharge of one employee, and a general failure to recall laid-off employees. Otherwise, as pointed out by the Respondent, the Union did not seek to bargain about the layoffs and recall. Moreover, Collazo, the union steward, testified that he communicated with Lazazzero approximately three times per month from the time of the layoff until early 1994, and during that time period, Collazo told Lazazzero about the hiring of temporary and subcontract employees, including Teresa Dorris. Collazo, as steward, never requested bargaining on any matter connected to the layoff or to the recall of laid-off employees. Sometime after January 1994, Lazazzero and Collazo stopped speaking and it appears that Lazazzero and the Union simply gave up making any efforts for the bargaining unit.

#### A. The Overtime Issues

Employees Almonte and Cabrera both testified that in 1992. shortly after the election, Supervisor Coiro said to them that those who had voted for or brought in the Union would not get overtime. Coiro, on the other hand, gave credible testimony that he had surgery and was not at the Company between mid-June and mid-August and I credit his denial of his participation in any conversation in which he made the alleged remarks. He also denied making any similar statement to Almonte in March 1993 and further explained that he does not speak more than a few words of Spanish, that Almonte and Cabrera probably understand only 20 percent of what he says in English and that he communicates with them by showing them what he wants or by having Collazo act as a translator. When Almonte testified about the March 1993 conversation he said only that Coiro said they could not work overtime because of Winchell's instructions and responded. "[Nlo" to the General Counsel's question of what if Coiro said. "[W]hat you should do if you didn't like no overtime?" He then changed his answer to yes after review-

Almonte said he understood (spoken) English "but not very much," but could read English a lot. He also said he understood what Coiro said in English about overtime. Under these circumstances, it is not clearly established that Almonte correctly understood all of what Coiro might have said and I find credible only that in March 1993 Coiro said the employees could not work overtime because of Winchell's instructions and I find no direct credible testimony that Coiro said anything in March 1993 about union involvement as it related to the overtime situation. Accordingly, I find that the General Counsel has failed to show a violation of Section 8(a)(1) in this respect as alleged in the complaint.

Although the record shows that Collazo became union steward, it otherwise shows that the Respondent specifically avoided selecting him for layoff for that same reason and I find no credible reason to indicate that he was denied overtime because of his status. There is no credible evidence that Coiro made any statement linking Collazo to a denial of overtime. Otherwise, the Respondent's records and Winchell's testimony show that there had been a generally companywide reduction in overtime at the time Collazo returned to work in February on light duty from an injury that caused several months absence from work. The evidence shows that morning overtime was cut entirely, other overtime was reduced, and the use of overtime was limited to certain job categories such as press brake (a metal forming machine), paint line, and final assembly. Although Pat Ferullo (classified as a welder, as was Collazo) did work overtime in 1993, he worked this overtime in the press brake area, not welding, and I find that the Respondent has shown that it had legitimate business reasons for reducing overtime and for selecting Ferullo, not Collazo for some of the limited overtime. I find that the nonselection of Collazo for overtime would have occurred in this manner regardless of Collazo position as union steward or the Union's certification as bargaining representative based on the support of its Hispanic employees, see the Wright Line analysis, infra, and I conclude that no violation of Section 8(a)(1) and (3) is shown as alleged.

## B. Discharge of Danilo Guzman

In proceedings involving changes in conditions of employment and disciplinary action against employees, applicable law requires that the General Counsel meet an initial burden of presenting sufficient evidence to support an inference that the employees union or other protected concerted activities were a motivating factor in the employer's decision to change their conditions of employment or to discipline them. Here, the record shows that the Respondent was aware of the employees' union activity. The credible evidence also supports an inference that it was aware that the Hispanic employees had attended union meetings and that all were supporters of the Union. The Respondent also engaged in a strong antiunion election campaign and engaged in other conduct, most specifically the unrebutted statement by Supervisor French to Union Representative Lazazzero after the Union was certified that Lazazzero could not come on the property and that owner Winchell was upset that French had allowed it earlier, which clearly shows union animus attributable to the company owner.

As noted by the Court in *Town & Country Electric v. NLRB*, 106 F.3d 816 (8th Cir. 1997)—an ALJ may properly use an employer's attitudes about unions as one factor in evaluating the credibility of the employer's witnesses and drawing inferences regarding the employer's motive. See *York Products*, 881 F.2d 542; *Ballou Brick Co. v. NLRB*, 798 F.2d 339, 342 (8th Cir. 1986); *McGraw-Edison Co. v. NLRB*, 419 F.2d 67, 75 (8th Cir. 1969).

Under these circumstances, I draw such an inference and find that the General Counsel has met his initial burden by presenting a prima facie showing sufficient to support an inference that the employees' union activities were a motivating factor in Respondent's subsequent decision to not recall laid-off em-

ployees and to terminate Guzman. Accordingly, the testimony will be discussed and the record evaluated in keeping with the criteria set forth in *Wright Line*, 251 NLRB 1083 (1980), see *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), to consider Respondent's defense and whether the General Counsel has carried his overall burden.

As pointed out by the Court, in *Transportation Management Corp.*, supra:

an employer cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected concerted activity.

Here, the record shows that Guzman was a valued and longterm employee, however, he was one of the initiators of the effort that brought in the Union and he attended union meetings and voted in the election. After being injured in the same car with Union Steward Collazo and Cabrera in an automobile accident on June 21, Guzman initially notified Respondent about his condition on June 23 and thereafter informed the Employer about his status. When he was medically cleared to return to work on August 1 he got his paperwork, returned to Respondent's facility and was refused employment.

The Employer claims that Guzman was terminated because he violated an unwritten rule concerning absenteeism. Guzman was not aware of any such rule and it is clear that the Respondent, in its correspondence with Guzman after the accident, made no mention of this rule and the Company's correspondence to Guzman, as well as its note to his chiropractor seem only to be concerned with his ability to perform his job duties. Here, the mere fact that the Respondent did not discharge or act against a more prominent union supporter (Steward Collazo) with whom Guzman rode in the same carpool is irrelevant, especially since they followed slightly different procedures in notifying the Company. Guzman testified that he mailed material to the Company (in a postal service mailbox) which raises a presumption of delivery. Although the Respondent claims it didn't receive this information, it was aware that his daughter had come to the Respondent and delivered a note from a doctor of chiropractory saying he was being treated and was unable to return to work and needed to be reevaluated in a week.

Winchell testified that Guzman was terminated because the Company didn't "know what happened to this guy, he just vaporized for about a month and we didn't hear anything. We consider, and she wrote on her form to the Unemployment Board, that he had abandoned his job by not keeping us informed as to what was going on."

In fact, Guzman obtained a clearance from his chiropractor dated July 28 and he attempted to return on Monday, August 1, but found that his timecard had been removed. He went to Supervisor Coiro and testified that he gave him the doctor's note but that Coiro said, "[Y]ou don't have any more work"—"Winchell said that you don't have any work." Winchell, however, testified that Coiro asked for a medical slip but Guzman didn't have one. Coiro testified that he asked for a slip but that Guzman never gave him a paper and that he did not remember if Guzman said anything in response to his demand. Coiro did

not indicate that he made any effort to have his remarks in English to Guzman translated to Spanish but did testify that he said:

[Y]ou can't come back to work because you need a letter from your doctor because you've been out on an injury and you can't come back without a doctor's note so that we can put you on the proper work.

Coiro admitted that he was aware that the several employees had been in an accident and he reluctantly admitted that he "probably" had conversations (that he didn't remember), with Winchell (but not at any length), about Guzman status prior to August 1.

Then, with out any further attempt to communicate with Guzman after he attempted to return, the Respondent then proceeded to invoke its unpublished rule and without any further warning, request for compliance, or inquiry about Guzman's understanding of what was required, it simply ended his employment.

At one point Guzman and owner Winchell were the only two people in the plant trained and able to operate one major piece of machinery. Coiro testified the he and Winchell probably discussed Guzman's status, yet nothing was done to insure that Guzman understood what was supposedly required of him. I am not persuaded that the Respondent would have taken such a cavalier approach to Guzman's termination when it clearly knew he had attempted to return to work on August 1. Instead of helping to clarify his status, it seized upon the opportunity to diminish the number of Hispanic union supporters remaining in the plant and abruptly ended his long-term employment with the Company.

I find that Respondent claim that it never received certain communication from Guzman is unlikely and I do not credit Coiro's denial in this respect, however, it does not affect the ultimate conclusion herein. Moreover, the fact that Guzman sought unemployment compensation when he understood he couldn't come back to work provides no presumption or excuse for the Respondent's actions and I conclude that the Respondent has failed to show that it would have acted in this extreme manner with Guzman even in the absence of the union activities by Guzman and the other Hispanic employees. Accordingly, I find that the General Counsel has met his overall burden and has shown that Guzman's termination violated Section 8(a)(1) and (3) of the Act, as alleged.

# C. Failure to Recall Estervina Sanchez

Estervina Sanchez and Alex Caporizzo held the same job and were laid off on September 15, 1993. On October 1, only Caporizzo was recalled. Sanchez was a Hispanic employee who had attended union meetings both before and after the election and she voted in the election. She also approached the Union about a pay problem and the Union raised that issue with the Employer at negotiations and also filed an unfair labor practice charge on her behalf. Accordingly, I find that Sanchez was both generally and specifically identified as a union supporter. Moreover, I credit her testimony that on one occasion Supervisor Coiro told her to go to the Union for more money when she inquired about her pay rate.

Although she was not recalled, the Respondent recalled a less senior non-Hispanic employee (who had been trained by Sanchez and was not employed at the time of the election). Both were electrical assemblers, however, the Respondent offered contradictory reasons for its failure to recall Sanchez. At the hearing. Respondent claimed that the work was either too heavy or bulky for her and that her health insurance costs as a long-term employee would have been prohibitive. During the investigation of the charge the Respondent offered a different set of reasons, including the possibility that there was not enough work for her and that she got more money on unemployment compensation than she would get for part-time work. Moreover, the Respondent denied the fact that Teresa Dorris the wife of a supervisor, was doing light assembly work at home, work on the same type of units that Sanchez was most capable of doing. The Respondent's assertion that Sanchez lacked multiple skills and could not handle anything other than small assemblies is unpersuasive. Sanchez testified that she wired and picked up lamp units of 25 or 30 pounds and also sometime had done packing in addition to assembly of power strip units.

Here I find that the Respondent has pretextually downgraded Sanchez abilities as compared to the less senior non-Hispanic employee it recalled and it essentially avoided any duty to recall her to a full-time position by expanding its apparent use of a supervisor's wife as a home subcontractor. These circumstances do not constitute a persuasive showing that the Respondent would have taken the same action in the absence of Sanchez's use of the Union to plea for fair and equal wages and the other generalized union activities of the Hispanic workers and I conclude that the Respondent has failed to meet its burden in this respect and I find that the Respondent's abandonment of Sanchez after her layoff and its failure to recall her from layoff was discriminatorily motivated and would not have occurred but for the protected union activity. Accordingly, I find that it violates Section 8(a)(1) and (3) of the Act, as alleged.

# D. Failure to Recall and Bargaining

The record shows that Respondent laid off a majority of the employees represented by the Union in September 1993. Respondent notified the Union of the layoff 2 days before the layoff became effective; the notification indicated that the layoff was going to be of short duration and that employees would be recalled as economic conditions allow. While approximately five employees were recalled, the last employee recalled was Aquiles Cabrera in January 1994. No employees were recalled after this date, however, some workers were obtained through the service of a temporary employment agency and then, between September and November 1994, the Respondent hired four new regular full-time employee. Respondent did not notify the Union that it was going to end the recall of the laid-off employees.

The Respondent's last communication with the Union was sent on December 10, 1993, and it indicates that a unit employee is taking leave and his position will be temporarily filled by a supervisor and that Mike Direco would be recalled. The Union's failure to respond could allow the Respondent to infer that the Union acquiescence with its proposed action but the

failure to respond to this correspondence or the September layoff notice is insufficient to show that the Union has abandoned the unit

The specific matter of recall of employees from layoff is a mandatory subject of bargaining. *Quality Packaging, Inc.*, 265 NLRB 1141, 1149 (1982), and it is clear that Respondent never notified the Union of its decision to stop the recall of laid off unit employees. The Union was not given an opportunity to bargain about the decision or effects of Respondent's refusal to recall laid off employees and the Union was not notified that the Respondent was changing its originally communicate plan for recall of employees as economic conditions allow.

Except as discussed above regarding employee Sanchez, the Respondent offers no legitimate reason for its failure to recall unit employees and the record is devoid of probative evidence establishing any lawful business reason for Respondent's failure to recall unit employees. Under these circumstance, and in light of the overall record, it is clear that the failure to recall is a further manifestation of Respondent's antiunion motivation and, accordingly, I find that its actions in this respect also are shown to violate Section 8(a)(1), (3), and (5) of the Act, as alleged.

Lastly, it is noted that the general charges related to failure to recall were filed in October 1994 shortly after the first regular full-time employee was hired in September and there was no intervening notice from the Respondent after the last laid-off employee was recalled in January 1994. I find that this event triggered the 10(b) period and the charge therefore was timely. Moreover, I find that the amended April 1996 charge is "closely related" to the factual situation and theory of timely change, see *Redd-I Inc.*, 290 NLRB 1115 (1988), and I reaffirm my acceptance of the amended complaint.

## CONCLUSIONS OF LAW

- 1. Respondent is an Employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
- 2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
- 3. By discharging Danilo A. Guzman on August 1, 1993, and failing and refusing to recall Estervina Sanchez from layoff because of their union or other protected activity, Respondent has violated Section 8(a)(1) and (3) of the Act.
- 4. By hiring new employees and failing and refusing to recall laid off employees or to notify the Union of its changed plans in September 1994 and thereafter, Respondent has violated Section 8(a)(1), (3), and (5) of the Act.
- 5. Except as found herein, Respondent otherwise is not shown to have engaged in conduct violative of the Act as alleged in the complaint.

#### REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find it necessary to order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

With respect to the necessary action, it is recommended that Respondent be ordered to reinstate employee Danilo A. Guzman, and to recall employee Estervina Sanchez and all other employees laid off in September 1993, who were discriminatorily denied recall, to their former jobs or substantially equivalent positions, dismissing, if necessary, any temporary employees or employees hired subsequently, without prejudice to their seniority or other rights and privileges previously enjoyed, and make them whole for any loss of earnings they may have suffered because of the discrimination practiced against them by payment to them of a sum of money equal to that which they normally would have earned from the date of the discrimination to the date or reinstatement in accordance with the method set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).<sup>1</sup>

The Respondent also shall be ordered to remove from its files any reference to Guzman's discharge and notify him in writing that this has been done and that evidence of the unlawful discharge will not be used as a basis for future personnel action against him. And, because the violations also involve Section 8(a)(5) of the Act, Respondent also shall be ordered to bargain, upon request, in good faith for a reasonable period of time with the Union as the exclusive bargaining representative of the unit about terms and conditions of recalling unit employees from layoff. Otherwise, it is not considered necessary that a broad Order be issued.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended.-2

#### ORDER

The Respondent, Wilmington Fabricators, Inc., Wilmington, Massachusetts, its officers, agents, successors, and assigns shall

- 1. Cease and desist from
- (a) Discriminatorily terminating or failing to recall any employee from layoff because of the employees engaging in union or other protected activities.
- (b) Discriminatorily failing and refusing to recall laid-off employees or failing to notify the Union of its planned actions.
- (c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.
- 2. Take the following affirmative action necessary to effectuate the policies of the Act.
- (a) Within 14 days from the date of this Order, offer Danilo A. Guzman and Estervina Sanchez immediate and full reinstatement (or recall) and offer recall to all employees laid off in September 1993, who were discriminatorily denied recall and make them whole for all losses they incurred as a result of the discrimination against them, in the manner specified in the section the remedy.
- (b) Within 14 days from the date of this Order, remove from its files any reference to Guzman's termination and within 3

<sup>&</sup>lt;sup>1</sup> Under *New Horizons*, interest is computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621.

<sup>&</sup>lt;sup>2</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

days thereafter notify the employee in writing that this has been done and that evidence of the unlawful termination will not be used as a basis for future personnel action against him.

- (c) Within in 14 days of a request by the Union bargain in good faith with the Union about the terms and conditions of recalling unit employees.
- (d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order
- (e) Within 14 days after service by the Region, post at its Wilmington, Massachusetts, facilities copies of the attached notice marked "Appendix." Copies of the notice in both Eng-

lish and Spanish on forms provided by the Regional Director for Region 1, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps the Respondent has taken to comply.

National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

<sup>&</sup>lt;sup>3</sup> If this Order is enforced by a Judgment of the United States court of appeals, the words in the notice reading "Posted by Order of the